

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

Kevin McStay

Respondent.

No. 11-036

STIPULATED FACTS,
CONCLUSIONS AND ORDER

I. STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090(1) between the Respondent, KEVIN MCSTAY, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through MELANIE DeLEON, Executive Director. The following stipulated facts, conclusions, and agreed order will be binding upon the parties if fully executed, and if accepted by the Board without modification(s), and will not be binding if rejected by the Board, or if the Respondent does not accept the Board's proposed modification(s), if any, to the stipulation.

Section 1: PROCEDURAL FACTS

1.1. On November 18, 2011, the Executive Ethics Board (Board) received a complaint alleging that Kevin McStay, Social Worker 4, Unit Supervisor, Department of Social and Health Services may have violated the Ethics in Public Service Act by using state resources for personal gain.

1.2. The Board is authorized under RCW 34.05.060 to establish procedures for attempting and executing informal settlement of matters in lieu of more formal proceedings

1.3. Kevin McStay understands that if Board staff proves any or all of the alleged violations at a hearing, the Board may impose sanctions, including a civil penalty under RCW 42.52.480(1)(b) of up to \$5,000, or the greater of three times the economic value of anything received or sought in violation of chapter 42.52 RCW, for each violation found. The Board may also order the payment of costs, including reasonable investigative costs, under RCW 42.52.480(1)(c).

1.5. Kevin McStay waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or his acceptance of any modification(s) proposed by the Board, pursuant to the provisions of WAC 292-100-090(2) which provides in part:

1.6. If the Board accepts this stipulation, the Board will release and discharge Kevin McStay from all further ethics proceedings under chapter 42.52 RCW for matters arising out of the facts contained in the complaint in this matter, subject to payment of the full amount of the civil penalty due and owing, any other costs imposed, and compliance with all other terms and conditions of the agreed order. Kevin McStay in turn agrees to release and discharge the Board,

its officers, agents and employees from all claims, damages, and causes of action arising out of this complaint and this stipulation and agreed order.

1.7. If this Stipulation is accepted, this Stipulation and Order does not purport to settle any other claims between Kevin McStay and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future.

1.8. If this Stipulation is accepted, this Stipulation and Order is enforceable under RCW 34.05.578 and any other applicable statutes or rules.

1.9. If the Board rejects this stipulation, or if Kevin McStay does not accept the Board's proposed modification(s), if any, this matter will be scheduled for an administrative hearing in front of the Board and Kevin McStay waives any objection to participation by any Board member at any subsequent hearing to whom this stipulation was presented for approval under WAC 292-100-090(2). Further, Kevin McStay understands and agrees that this proposed stipulation and information obtained during any formal settlement discussions held between the parties shall not be admitted into evidence at a subsequent public hearing, unless otherwise agreed by the parties.

Section 2: FINDINGS OF FACT

2.1. Mr. McStay was a Social Worker 4, Unit Supervisor for the Department of Social and Health Services (DSHS) for all times pertinent to this investigation.

2.2. There is evidence to show that Mr. McStay used his state issued computer to visit sites on the internet and that he sent/received e-mails that were directly related to his outside business as a musician in a local band. On September 24, 2009, the State Auditor's Office (SAO) investigator's obtained Mr. McStay's work computer to conduct a forensic analysis of the computer hard drive. Some samples of the evidence found to support the allegations are listed below:

E-MAILS – the main categories of non-work related were:

- The Subjects Band – The SAO found 13 e-mails related to Mr. Mcstay's band members, contacts at performance venues, and e-mails to other DSHS employee to promote the band's appearances. Some of the e-mails include an attachment of the band's flyer.

INTERNET – December 8, 2008 through September 12, 2009.

- Social networking: webmail, online calenders, search engines, and two social networking sites – 222 visits.
- You Tube: 174 visits
- Music: 80 visits to search engines looking for concerts, instruments, song lyrics, and links to Mr. McStay's band.

2.3. During this same time, McStay used additional time and state resources to produce flyers and banners to advertise his band.

2.4. Mr. McStay installed an AOL account on his work computer.

Section 3: CONCLUSIONS OF LAW

3.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Kevin McStay and over the subject matter of this complaint.

3.2. Pursuant to WAC 292-100-090(1), the parties have the authority to resolve this matter under the terms contained herein, subject to Board approval.

3.3. The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees from using state resources for their benefit. RCW 42.52.160(1) states:

No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

3.4. Based on Findings of Fact 2.1 through 2.4, Kevin McStay used state resources to promote his outside business, a musician in a local band, in violation of RCW 42.52.160 and WAC 292-110-010.

3.5. The Board is authorized to impose sanctions for violations to the Ethics Act pursuant to RCW 42.52.360. The Board has set forth criteria in WAC 292-120-030 for imposing sanctions and consideration of any mitigating or aggravating factors.

Section 4: AGGRAVATING AND MITIGATING FACTORS

In determining the appropriateness of the civil penalty, the Board reviewed the criteria in WAC 292-120-030. It is an aggravating factor that Kevin McStay was a Unit Supervisor at all time pertinent to this case. It is a mitigating factor that Mr. McStay received a reprimand from his agency. It is a mitigating factor that Mr. McStay's actions were unintentional. It is also a mitigating factor that Mr. McStay met with Board staff, admitted his wrongdoing and is now working hard in his unit to educate his co-workers on his experience and how to use state resources appropriately.


Section 5: AGREED ORDER

5.1 For the violation RCW 42.52.160, Kevin McStay will pay a civil penalty in the amount of, three thousand dollars (\$3,000.00). The Board agrees to suspend (\$1,500.00) on the condition that Kevin McStay complies with all terms and conditions of this Stipulation and Order and commits no further violations of RCW 42.52 for a period of two years from the date this agreement is executed.

5.2 The civil penalty of \$1,500.00 is payable in full, to the State Executive Ethics Board within 45 days after this stipulation is accepted by the Board, or as otherwise agreed to by the parties.


II. CERTIFICATION

I, Kevin McStay, hereby certify that I have read this Stipulation and Agreed Order in its entirety; that my counsel of record, if any, has fully explained the legal significance and consequence of it; that I fully understand and agree to all of it; and that it may be presented to the Board without my appearance. I knowingly and voluntarily waive my right to a hearing in this matter; and if the Board accepts the Stipulation and Agreed Order, I understand that I will receive a signed copy.



KEVIN McSTAY Date
Respondent

Stipulated to and presented by:



Melanie deLeon Date
Executive Director

II. ORDER

Having reviewed the proposed Stipulation, WE, THE STATE OF WASHINGTON EXECUTIVE ETHICS BOARD, pursuant to WAC 292-100-090, HEREBY ORDER that the Stipulation is

✓ ACCEPTED in its entirety;

 REJECTED in its entirety;

 MODIFIED. This Stipulation will become the Order of the Board if the Respondent approves* the following modification(s):

DATED this 16th day of March, 2012.

M. Williams III
Matthew Williams, III, Chair

Lisa Marsh
Lisa Marsh, Vice-Chair

Linnaea Jablonski
Linnaea Jablonski, Member

Nancy Biery
Nancy Biery, Member

* I, _____, accept/do not accept (circle one) the proposed modification(s).

KEVIN McSTAY, Respondent

Date